No. 05-5705

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SUPREME COURT, U.S.

In The
Supreme Court of the United States

HERSHEL HAMMON,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

On Writ Of Certiorari To The Indiana Supreme Court

REPLY BRIEF OF PETITIONER HERSHEL HAMMON

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I. Introduction: The Intelligible Confrontation Clause

When this Court "make[s] the constitutional bases for decision understandable to the public," it helps "to ensure the continuing accessibility of the Constitution to the People." Thus, it "serve[s] our commitment to being an intelligent democracy," in which the Justices of this Court are "'teachers in a vital national seminar'" and the "original and ultimate authority of [this] Court in expounding the Constitution lies . . . with a People thus educated." JOSEPH GOLDSTEIN, THE INTELLIGIBLE CONSTITUTION: THE SUPREME COURT'S OBLIGATION TO MAINTAIN THE CONSTITUTION AS SOMETHING WE THE PEOPLE CAN UNDERSTAND 112 (1992) (quoting in part Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952)).

The position advocated by Petitioner plainly advances this goal of intelligibility. Petitioner contends that the Court can decide this case by adopting a simple and intuitively appealing principle: A statement made to a known police officer and accusing another person of a crime lies at the core of concern of the Sixth Amendment's guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

In contrast, the Respondent State of Indiana and its supporting *amici* offer a range of theories noteworthy for their variety and complexity. The State and *amici* have spent enormous energy searching for a theory that would justify admissibility of accusations like the one made in this case. (They recognize that the theory of the Indiana Supreme Court is inadequate; the State expressly rejects it, and none of the *amici* endorse it.) But all this effort has failed to produce a conception that would make the Confrontation Clause intelligible to ordinary citizens. That in itself suggests that the result they advocate is inconsistent with the majestic and straightforward language of this provision of the Bill of Rights. And analysis confirms that all their diverse approaches lack merit.

II. Affirmance Would Countenance a System of Testifying by Making an Accusation to a Police Officer.

Petitioner's argument is built upon a simple and sturdy framework. The Confrontation Clause is not a prohibition of a single disfavored practice but rather an affirmative guarantee of the conditions under which testimony against an accused must be given: face-to-face, with an opportunity for cross-examination. Accordingly, a state may not develop a system in which a witness may testify in any other way – for example, by speaking in private with a police officer. And clearly, states will be free to do just that if this Court holds that Petitioner may be convicted on the basis of the accusation made by Mrs. Hammon to Officer Mooney.

Indeed, taking advantage of the laxity that marked Confrontation Clause doctrine in recent years before *Crawford v. Washington*, 541 U.S. 36 (2004), states have already created such a closed-door system of testimony. That is obvious on the face of the matter: A reasonable complainant reporting a violent crime to the police understands that the report will likely generate an official response.[1] But if there were doubt about the nature of the system that the states have created, it would be removed by the extensive publicity efforts that governmental and non-governmental agencies have made. Calls to 911 or to

[1] *Amicus* National Association of Counsel for Children (NACC), Br. at 16 n.9, cites Robert Apsler et al., *Perceptions of the Police by Female Victims of Domestic Partner Violence*, 9 VIOLENCE AGAINST WOMEN 1318, 1326 Tbl. 1 (2003), for the proposition that only 1/3 of those reporting domestic violence incidents in that study wanted arrest. This is factually incorrect and misleading. The question of what action the caller wanted was posed to only about 2/3 of the 95 subjects in the study; 31 (about half) said they wanted arrest and 36 said they wanted to obtain or enforce a restraining order. *Id.* at 1323-24, 1326. It thus appears likely that most, and perhaps virtually all, wanted at least one form of official response. Further, the study is vague as to the kinds of incidents involved; it appears probable that only a perceived violation of a restraining order, and no battery, prompted many of the calls. Finally, the material question is reasonable anticipation, not desire.

the police reporting domestic violence are often not merely spontaneous responses; potential victims are advised to make careful *preparations* to call in case of a violent incident.[2] And, in large part *for the purpose of preparing a criminal case or seeking other legal sanctions against an alleged abuser*, agencies urge that actual victims place such calls and make detailed statements to responding officers.[3] Obviously, it is

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[2] For example, in a widely adapted "personalized safety plan" developed by the Metro Nashville Police Department, potential victims are advised to be prepared to call 911, to keep change for telephone calls at all times, to avoid using credit cards for calls, and to teach their children to call the police and fire departments. *E.g.*, Connecticut Coalition Against Domestic Violence, *Personalized Safety Plan*, <http://www.ctcadv.org/Website/personalized_safety_plan__below_.htm> (All websites cited in this brief were last visited March 8, 2006.). Some agencies offer cell phones that will only call 911. *E.g.*, The Safe Home, *Personalized Plan*, <http://www.thesafehome.org/Completed/personalized_safety_plan.htm>. *See also* People v. Cortes, 781 N.Y.S.2d 401, 405 (N.Y. Sup. 2004) ("the New York City Police Department is not alone in preparing the public to use 911 calls to report crimes. Sources tell people what information will be requested by the emergency operator").

[3] *See, e.g.*, Women's Justice Center, *The Greatest Escape. Special for Victims of Domestic Violence*, <http://www.justicewomen.com/tips_escape.html> ("The tape recording of your 911 call is frequently a key piece of evidence in your case. So keep talking! Don't hang up!"); Alternatives to Violence of the Palouse, Inc., Domestic Violence, <http://community.palouse.net/ATVP/Pages/Information_Pages/DomesticViolence.html> ("When the law enforcement officers arrive at your house, show them any legal or court papers you may have . . . . The law enforcement officers will listen to you and make a written statement. Tell the law enforcement officers what happened, and give them as much detail as possible. They will write down, or tape record, what you say. If you have any injuries, tell the officers so photographs can be taken."); North Brunswick (N.J.) Domestic Violence Response Team, *Love Shouldn't Hurt*, <http://www.northbrunswickonlinecom/police/dvinfo.html> ("SHOULD I CALL THE POLICE? YES! . . . [T]he police must respond to your calls . . . . Among other things, the police must write a report. Be sure to tell the officer all the details. . . . THE POLICE MUST ARREST YOUR ABUSER AND SIGN A COMPLAINT IN THE FOLLOWING SITUATIONS . . . ."); BlackWomensHealth, *Domestic Violence: When Love Becomes Hurtful*, <http://www.blackwomens

important and beneficial for crime victims to call 911 or the police, to be prepared to do so in advance, and to give detailed information when they do. But it is also obvious that if an

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health.com/domestic_violence.htm> ("Domestic violence is a Federal crime. Call 911 immediately. This will >activate the criminal justice system in regards to your domestic violence abuse and injurious claims."); Ada County Prosecutor, *Domestic Violence Unit*, <http://www.adaweb.net/departments/prosecutor/DomesticViolenceUnit.asp> ("[R]eport domestic violence to the police as soon as possible. Make every effort to preserve any evidence of the crime and share that evidence with the police."); National Clearinghouse on Abuse in Later Life, *Frequently Asked Questions*, <http://www.ncall.us/> ("What happens if I call the police? . . . [A]n investigation will immediately begin. If the police feel a victim is in immediate danger of harm, they will go to the residence to investigate the situation. They will interview the alleged abuser, victim and any witnesses. They will take pictures of any bruising or injuries. They will collect any physical evidence, including statements made by the alleged victim, abuser or the neighbors. . . . The reports from the law enforcement officers will then go to the prosecuting attorney . . . . "); California Courts, *Self-Help Center*, <http://www.courtinfo.ca.gov/selfhelp/protection/dv/respolice.htm> (advising callers to tell arriving police as much as possible about, *inter alia*, what happened, who caused injury, if a restraining order was violated, past violence, and to ask them to take pictures showing injury); Illinois Coalition Against Domestic Violence, *How Can I Help to Get the Abuser Convicted of a Crime Committed Against Me?*, <http://www.ilcadv.org/legal/e_based_prosecution.htm> ("Seek Medical Attention Immediately. Tell the emergency room personnel what happened to you. . . . Make a Police Report because it will become evidence of the abuse . . . . The police should gather the evidence of the abuse at the scene. . . . Evidence includes . . . the names and statements from anyone who heard or saw the attack."); Oakland County Coordinating Council Against Domestic Violence, *Domestic Violence Handbook*, <http://www.domesticviolence.org/safe.html> ("[W]hen the police come, . . . [t]hey can arrest your abuser when they have enough proof that you have been abused. . . . [T]ell them everything the abuser did that made you call. . . . Show them any marks left on your body. . . . If you see a mark after the police leave, call the police to take pictures of the marks. They may be used in court. . . . Police reports can be used in court if your abuser is charged with a crime."); Familydoctor.org, *Domestic Violence: Protecting Yourself and Your Children*, <http://familydoctor.org/052.xml> ("Call the police if you think you can't leave home safely or if you want to bring charges against your abuser.").

accusation made to the police is acceptable proof even though the complainant never confronts the accused, then we have countenanced a new form of prosecution testimony. That is, a state can secure a conviction on the basis of an accusation by a complainant who understood as she was making it that it would likely be used by the legal system against the person she accused.

Nor is this development limited to accusations made in the immediate aftermath of the incident; indeed, states have passed statutes *designed* to authorize admission at trial of accusatory statements that have been recorded, in writing or electronically, or made to law enforcement officers, even a considerable time after the incident.[4] Plainly, only a decision by this Court will ensure that this Nation adheres to the traditional, and constitutionally mandated, method by which prosecution witnesses give testimony.

III. A "Resemblance" or "Formality" Theory is Fallacious.

Many of the arguments raised by the State and supporting *amici* share a common fallacy: To determine what is testimonial within the meaning of *Crawford*, they begin with the formal methods that have been used by judicial systems and ask whether a given practice sufficiently "resembles" them. Under this family of theories, the Confrontation Clause prohibits only formal practices that "resemble" certain inquisitorial methods of securing testimony that were extant at the time the Clause was adopted. Although resemblance of a given practice to inquisitorial processes that were known and disapproved by the Framers is *sufficient* to demonstrate that such a practice is covered by the Clause, *see Crawford*, 541 U.S. at 50-53, the

[4] *See* Ore. Rev. Stat. 40.460(26)(a) (24-hour limitation); Cal. Evid. Code § 1370; Michigan Legislature, Senate Bill 0263, <http://www.legislature.mi.gov/(33isqk55vhg1cs45dedraz55)/mileg.aspx?page=BillStatus&objectname=2005-SB-0263> (tracking progress of bill, similar to Oregon legislation, that has passed both legislative houses, in slightly different forms).

theory that such resemblance is *necessary* for the Clause to apply is fallacious on several grounds.

First, the Clause is an affirmative *guarantee* of a particular practice, not a prohibition of a particular disfavored practice. The Clause does *not* say: "In criminal prosecutions, testimony secured by inquisitorial processes such as those used in civil law systems shall not be allowed." Rather, it provides that "[i]n *all* criminal prosecutions, the accused shall *enjoy* the *right* . . . *to be confronted* with the witnesses against him" (emphasis added).

Second, the history behind the Clause confirms that it was meant not simply to prevent one form of testimony but rather to ensure adherence to the long-established method of giving prosecution testimony in a common-law court – face-to-face with the accused.

For centuries before adoption of the Confrontation Clause, the hallmark of a common-law criminal trial was a lawyer-free "altercation" between accuser and accused.[5] The accuser – who in the vast majority of cases was the prosecutor or prosecutrix, because there was no public prosecutor as we know it – thus had to appear at trial and testify; if he or she did not, the case ordinarily could not go forward. The Old Bailey Sessions Papers, a valuable resource on which some *amici* rely, reports approximately 2000 cases between 1684 and 1834 in which the prosecutor or prosecutrix did not appear. Thorough searching has yielded only one in which the accused was convicted – and there because he had previously confessed.[6]

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[5] THOMAS SMITH, DE REPUBLICA ANGLORUM 114 (Mary Dewar ed., Cambridge Univ. Press 1982) (1583); JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 13 (2003).

[6] A search of <http://www.oldbaileyonline.org/search/crime/> for cases in which there was a "Specific Verdict" of "Prosecutor not present" yields a list of 1932 cases. If the search is further confined by asking for a "General Verdict" of "Not guilty," the same list appears. But if instead the search is confined by asking for a "General Verdict" of "Guilty," no cases are listed.

It was thus not the rule against hearsay, which was still rudimentary at the time of the Framing,[7] that prevented a prosecution case from being based on secondary reports of an accusation, but rather a fundamental understanding of how criminal prosecutions must be presented at trial. The attempts on the state's side to find exceptions to the confrontation principle only underscore how strong it was and how weak their arguments are. *Amicus* NACC offers cases in which secondary reports of accusations by children were admitted, Br. at 19-21, but as NACC recognizes, Br. at 22 n.13, young children were not deemed competent witnesses. Thus, their statements could not be regarded as testimonial in nature[8] – until *R. v. Brasier*, 1 Leach 199, 168 E.R. 202 (K.B. 1779), changed the rules, holding

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The one case of which Petitioner is aware in which the accused was found guilty notwithstanding the failure of the prosecutor to appear was *R. v. Selbey*, t17540424-16, <http://www.oldbaileyonline.org/html_units/1750s/t17540424-16.html> (1754). Selbey had confessed before the Justice of the Peace. The above-described search did not reveal this case, because the code "Prosecutor not present" was omitted by mistake from the online version of it. This case, as well as some others for which the coding was mistakenly omitted, may be found by searching for common phrasings that expressed the absence of the prosecutor or prosecutrix. Thus, a search for "prosecutor did not appear" produces a total of 567 cases, of which 31, including *Selbey*, should have the coding but do not.

[7] 12 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 509 n.7 (1938) (quoting Edmund Burke as saying in 1794 that a parrot could recite hte law of evidence in five minutes).

[8] These cases appear therefore to illustrate a more general principle that courts would be receptive to out-of-court statements by declarants who were incompetent to testify at trial. *See* LANGBEIN, ORIGINS, *supra*, at 238. The same consideration undercuts the attempt of *amici* Illinois et al., Br. at 10, to shrug aside the fact that *Thompson v. Trevanion*, Skin. 402, 90 Eng. Rep. 179 (K.B. 1693), their only pre-Framing authority for an excited utterance doctrine, was a civil case. As a civil party, the declarant there was disqualified for interest, 2 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 575, at 799-808 (James H. Chadbourn, rev., 1979); had she been prosecutrix in a criminal case, of course, her testimony would have been essential.

that sufficiently mature children could testify at trial, characterizing the out-of-court accusation made by the child there as testimonial,[9] and so excluding it.[10] The United States cites two "assault" cases, Br. In *Davis v. Washington*, No. 05-5224, at 25 n.4 – a misleading reference, because both were murder cases, and so the statements could easily be considered dying declarations, admissibility of which, Petitioner contends, Br. at 21 n.21, is best justified on forfeiture grounds.

To child-victim and homicide cases might be added cases in which out-of-court statements "supplemented sworn testimony." LANGBEIN, ORIGINS, *supra*, at 238.[11] But neither the State nor any of its supporting *amici* has cited *a single case* before the Framing or for decades after in which an accused was convicted on the basis of an accusation made out of his presence by a complainant who could have testified at trial but did not. Nor is Petitioner aware of any such cases. A conviction could not be based upon testimony by a constable of an accusation made behind closed doors.[12]

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[9] It is this characterization, not representing a change of law but rather a non-controversial understanding that (putting aside the age of the child) the accusation was testimonial in nature, for which Petitioner cited *Brasier* in his main Brief, at 27-28.

[10] How this history should now affect admission of statements made by children is, of course, a question that this Court need not reach here. Other considerations as well, not presented here, might affect how the confrontation right is applied with respect to child witnesses. *See, e.g.*, Sherman J. Clark, *An Accuser-Obligation Approach to the Confrontation Clause*, 81 NEB. L. REV. 1258, 1280-85 (2003).

[11] An illuminating case in this connection is R. v. Brandan, t17810222-46, <http://www.oldbaileyonline.org/html_units/1780s/t17810222-46.html> (1781). A witness, probably a constable, testified to an accusation made by the prosecutor, presumably to save time while waiting for him to appear – which he did not, and so the case was dropped without further ado.

[12] *E.g., R. v. Radbourne*, 1 Leach 457, 168 E.R. 330, t17870711-1, <http://www.oldbaileyonline.org/html_units/1780s/t17870711-1.html> (1787) (constable could not testify as to an accusation made by the victim "when the prisoner was not there"). The point for which *Radbourne* is cited

Third, it makes no sense to construe the Clause to prohibit forms of testimony that resemble those that were used by the great civilizations of Western Europe and to have no force at all when an accusation is made in any other manner, even in a complete absence of procedural protections. The whole point of the Confrontation Clause is to *ensure* that testimony will occur at trial, or some other formal proceeding offering such protections. But if the State is correct, a witness desiring to make an accusation and not confront the accused could do so in any number of ways. She could write a letter to the court, or send a message over the internet,[13] or make a videotape in private, perhaps with the help and at the urging of a victims' support organization, or initiate a conversation with a police officer, who could report to the court his recollection of what she said, and the Confrontation Clause would pose no obstacle at all.

To the extent they acknowledge this issue, the State and *amici* suggest either that bodies of law other than the Confrontation Clause should deal with it – which is patently inadequate[14] – or that such wide-open accusatorial systems pose no problem because the Clause is concerned only with prosecutorial abuse. This argument completely misunderstands the nature of the confrontation right.

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here has nothing to do with the question whether examinations pursuant to the Marian statutes (which the Confrontation Clause disapproved. *Crawford*, 541 U.S. at 50) could be introduced at trial though not taken in the presence of the accused. *Cf.* Br. of Illinois et al., at 14-15. *See also R. v. Woodcock*, 1 Leach 500, 168 E.R. 352 (1789) (usual mode of evidence is testimony on oath before jury, court, and accused, subject to cross-examination, but two other species are allowed, dying declarations and testimony pursuant to Marian statutes).

[13] The suggestion is not fanciful. *See* Domestic Violence Victim Information Center, *Victim Impact Statements*, <http://phoenix.gov/VICTIMSDV/dvimpact.html> (encouraging domestic violence victims to make statements online, or by letter or audio or video tape, for sentencing purposes).

[14] *Amicus* National District Attorneys Association, Br. at 27-28, attempts to wish the problem away by suggesting that state law might deal with these problems.

Notwithstanding the rather startling contention by *amicus* Cook County, Br. at 13-14 n.3, law enforcement officers do not violate the confrontation right, even when they take an *ex parte* statement from a witness. Good investigation often *demands* that they do so, and they even have valid reasons for taking formal statements – for example, for impeachment purposes. The Confrontation Clause is violated only when *the court* allows a testimonial statement to be used to convict an accused without his having had a chance to "be confronted with the witnesses against him."[15]

Fourth, a resemblance or formality theory gives law enforcement officials inappropriate incentives and invites manipulation by them. It is not hard to predict what will happen if the rule is that statements made in response to police questioning are inadmissible if but only if the questioning is formal: Questioning will tend to be conducted informally, and conviction will often depend on a police officer's rendition of what the complainant told him orally.[16]

Fifth, a resemblance or formality test is vulnerable to distortion. This case is a good example because, ironically, only by distortion could the accusation here be admitted under such a test. In *all critical respects*, the questioning here resembles the old inquisitorial practices: It is questioning by a law enforcement

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[15] That conduct by the court also constitutes state action for purposes of the Fourteenth Amendment, which incorporates the Confrontation Clause.

[16] Similarly, note the inappropriate incentive that would be created by exempting "excited utterances" from the Confrontation Clause. To get crucial information from a domestic violence caller who is in a distressed state, a 911 dispatcher should "try to calm the person down and ask the necessary questions." New Jersey Division of Criminal Justice, *Handling a Domestic Violence Call: In-Service Training for Police Dispatchers*, <http://www.njpdresources.org/dom-violence/dv-dispatcher-instr.pdf>; Women's Justice Center, *The Greatest Escape*, *supra* ("911 operators . . . are trained to help you stay calm."). And yet, as petitioner Davis points out, Rep. Br. at 3, dispatchers are often told *not* to calm the caller down, to save the "excited utterance" exception.

officer, out of the presence of the accused and of the court, designed to elicit incriminating information. The questioning constituted police interrogation, *cf. Rhode Island v. Innis*, 446 U.S. 291, 301 (1980) ("any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response"), though that characterization is not necessary for the accusation to be deemed testimonial.

Consider the particular test proposed by the State, whether the statement was made in response to "formal, coercive, tactically structured police questioning." Br. at 9. First, it is difficult to imagine a situation more coercive for a woman than being questioned by an armed, uniformed police officer, J.A. 24, who appears unready to leave the woman's home, at least without her children, J.A. 59, until he hears what he wants. Second, the questioning here was structured in accordance with common protocols.[17] Finally, in accordance with the officer's usual practice, the oral questioning was part of a continuous pro-cess by which he secured the formal, written affidavit. J.A. 2, 18.

IV. Petitioner's Confrontation Right Cannot Be Defeated by Characterizing the Accusation as a Response to Emergency Questioning.

The United States argues at length that "statements made to officials faced with an apparent emergency, and who ask

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[17] Such protocols recommend that two officers come to the scene and that they separate the parties to the dispute. *See, e.g.*, American Prosecutors Research Institute (APRI), *Preparing a Domestic Violence Case*, <http://www. ndaa-apri.org/apri/programs/vawa/ dv_101.html#preparecase> ("Separate the victim and the suspect before you interview either of them . . . ."); *Ohio Model Protocol for Responding to Domestic Violence*, <http://www.odvn.org/ PDFs/Protocoltexonly.pdf> (rev. ed. 2003), at 6 ("[W]henever possible, dispatch two officers to the scene"), 12 ("Separate the victim . . . and the alleged offender . . . and conduct separate interviews . . . in separate locations"). Further, Officer Mooney, not having secured an accusation in his first encounter, gathered more information and tried again, this time successfully.

questions reasonably necessary to resolve that emergency, are not 'testimonial'." *Amicus* Br. of United States at 5. Similarly, the State argues that statements "made in response to police actions or questions reasonably related to an objectively reasonable concern for the immediate safety of any persons or property" are not testimonial. Resp. Br. at 9. The argument is completely unavailing, for several reasons.

First, it runs counter to the text of the Confrontation Clause. There is, of course, no emergency exception to the Clause. *Compare* Art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

Second, there is no historical support for the argument. Neither the State nor the United States presents any cases in which statements that would otherwise invoke the confrontation right were deemed not to do so on the ground that they were made in response to emergency questioning.

Third, the argument does not square with a sound conception of the confrontation right. Whether a statement is deemed testimonial should be judged from the perspective of a reasonable person in the position of the declarant. If a reasonable person in that position would fully anticipate that her statement would be used in investigation or prosecution of a crime, the statement is testimonial, irrespective of whether it was made in response to questioning designed to resolve a real or apparent emergency, or indeed of whether it was made in response to any questioning at all. Suppose a police officer comes to the scene of a reported crime and asks an apparent victim, "What happened? It's important that we know quickly so that we can protect you and others!" Under the emergency questioning theory, the response would automatically be non-testimonial – even if it were, "Officer, Jack assaulted me. I'm telling you because I expect you'll arrest Jack, pursue charges against him, and relay my accusation to court." But if the court allowed the officer to do just that, the confrontation right would

clearly be violated.

Of course, most accusers are not so articulate about their anticipation, but the question is what they might reasonably anticipate and not what they say about their anticipation.[18] The United States argues that emergency questioning does not "clearly convey to the declarant that she is giving statements for use in a legal proceeding." Br. at 5. Even if that broad assertion were true – the United States offers no support for it, and materials such as those compiled above in note 3 indicate that it is not true – it is immaterial. If the *circumstances* impart such an understanding, that is enough. And it is apparent that when one makes an accusation of a serious crime to a police officer the reasonable anticipation is that the machinery of the criminal justice system will be invoked – and all the more so if the officer is persistently inquiring about a reported incident.

Fourth, the emergency theory would give law enforcement officers ample opportunity to gather accusatory statements in private from willing witnesses without constraint by the Confrontation Clause. The United States argues that "[a] reasonable officer would not engage in evidence gathering before ensuring how to protect a potential victim," Br. at 11.[19] The theory appears to be that police officers dealing with what can be

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[18] Contrary to a statement by the United States, Br. at 9, Petitioner's theory, by focusing on the reasonable anticipation of a person in the declarant's position, renders statements by a conspirator to an unknown government agent as clearly non-testimonial. Pet. Br. at 14-15.

[19] The United States also argues that statements made in response to emergency questioning can have probative value independent of live testimony, Br. at 7. But this point, even if true, is immaterial. *Crawford* makes clear that if a statement is testimonial it cannot be admitted against an accused absent an opportunity for cross-examination, and high probative value cannot be a substitute. 541 U.S. at 61. Besides, the argument proves too much: *Any* statement made before trial has independent probative value, because it reflects a fresher memory than does trial testimony, but that is no basis for admitting an out-of-court testimonial statement if the witness does not testify at trial.

characterized as an emergency give no thought to the prospect of securing useful evidence (notwithstanding the fact that accusatory statements of the type involved here are, according to the State and *amici*, critical evidence in many prosecutions), but that they receive accusations as a windfall of their protective work, and immediately turn their attention to gathering evidence with the affidavit forms that they happen to have on their persons when they come to the scene – and that this scenario repeats itself again and again and again. Such recurrent amnesia on the part of police officers would be terrifying if it were plausible. But of course the reality is very different. From the moment the attention of law enforcement officers is drawn to what appears to be a crime just committed, they are engaged not only in protecting the public against immediate harm but also in the collection of evidence, including accusatory statements.[20]

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[20] Notably, officers are told to record the exact words of "excited utterances." *E.g.*, NATIONAL VICTIM ASSISTANCE ACADEMY TEXTBOOK, <http://www.ojp.usdoj.gov/ovc/assist/nvaa2002/chapter9.html> (2002) ("Record 'excited utterances' (excited statements made by victims or witnesses at the critical stage immediately following the arrival of law enforcement), which may be allowed into court as exceptions to the rule against hearsay"); APRI, *Preparing a Domestic Violence Case, supra* ("Excited utterances should be written in quotes in the report to indicate that they are the victim's exact words."); National Advisory Council on Violence Against Women, *Toolkit to End Violence Against Women*, ch. 4, <http://toolkit.ncjrs.org/files/fullchapter4.pdf>, at 2 (advising implementation of "standardized, comprehensive guidelines and tools for collecting evidence," including 911 tapes and "excited utterance statements"); George Wattendorf, *Focus on Domestic Violence: Prosecuting Cases Without Victim Cooperation*, <http://www.fbi.gov/publications/leb/1996/apr1964.txt> (1996) ("It is important that officers document the victim's condition and note her exact statements concerning the assault. Officers can testify to such remarks as, 'He punched me!' under the excited utterance exception."); Maine Department of Public Safety, *Domestic Violence Response: Best Practices for Law Enforcement in Maine*, <http://mainegov-images.informe.org/dps/mcja/whats_new/DV%20 best%20practices.pdf> ("Locate parties upon arrival and *separate them*"). ("*Note excited utterances* – exact words by all parties"); *Law Enforcement Response to Violence Against Women*,

Fifth, an emergency doctrine distorts police incentives. If the rule is that an accusation can be good evidence if and only if it was made while an emergency appeared to exist, then officers have an incentive to preserve the existence, or at least the appearance, of an emergency until they secure the desired accusation.

Sixth, "emergency" is a notoriously flexible concept. The questions of whether an emergency should be deemed to exist – and how long it should be deemed to last – are easily manipulated.[21] And of course the problem is aggravated by speaking, as the United States does here, of "apparent" emergency.

Indeed, only by distorting the concept of emergency can it be stretched to reach the oral accusation made by Mrs. Hammon. By the time she made the accusation – a considerable, and unknown, time after the incident it purported to describe – she was protected by two police officers, one accompanying her and the other accompanying Petitioner. J.A. 81-82. No harm to her

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<http://www.mc.maricopa.edu/dept/d52/ajs/vaw/911.htm> ("An excited utterance statement recorded on a 911 call (or heard by a law enforcement officer in the field) can be an important prosecutorial tool. Because the victim may not appear for trial or may appear and change their statement, it is important to record words made by the victim that qualify as an excited utterance. This is an exception to the hearsay rule in the Rules of Evidence . . . ."); *New York State Domestic Incident Report Reference Manual*, <criminaljustice.state.ny.us/ojis/documents/new_%20dir_trainingmanual_letter_120605.doc> ("**WERE EXCITED UTTERENCES** [*sic*], **SPONTANEOUS ADMISSIONS OR SPONTANEOUS STATEMENTS MADE?** Mark off Yes or No. If 'YES,' write down your notes about any important statements about the incident by the victim (e.g. 'I'm afraid for my life.') . . . Your notes on victim statements may be critical for the establishment of 'excited utterances' .").

[21] When the question is whether a particular police practice is legitimate, then the question of imminence may nevertheless be an essential aspect of the inquiry; a practice that ordinarily would not be tolerated might become acceptable, and even meritorious, in sufficiently exigent circumstances. But the question here is not the validity of police practices. Assuming Officer Mooney was not coercive, he did nothing wrong (and the State does not suggest that coercion would have been proper).

was potentially imminent. The contention that there was an emergency therefore reduces to the possibility that harm could occur *if* the officers left the house. U.S. Br. at 13. But if that is enough to constitute an emergency, then there is an emergency *whenever* a person suspected of a violent crime is at large, or might be if the police leave him at liberty.[22]

That the questioning that prompted Mrs. Hammon's oral accusation[23] cannot be fairly described as an attempt to resolve an emergency is confirmed by the fact that, *in accordance with his usual practice*, the *very next thing* that Officer Mooney did after procuring the accusation was to solicit an affidavit to the same effect. J.A. 18.

Moreover, the State and the United States concede, as they must, that the affidavit was testimonial – but given that the officers had taken no further steps to prevent "present or imminent risk of harm to an individual or the public," U.S. Br. at 7, how was the affidavit less a response to emergency questioning than the oral accusation? The United States says that the solicitation of the affidavit communicated an intent to use the statement for legal purposes, Br. at 14, which of course

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[22] Thus, the United States fails in its attempt to distinguish *R. v. Brasier*, 1 Leach 199, 168 E.R. 202 (1779), on the ground that in that case the statement by the alleged victim "was made immediately after she arrived home." U.S. Br. in *Davis*, at 27. Left unprotected, the child might have gone outside and made herself vulnerable to a renewed assault; left unapprehended, the suspect may have assaulted another child.

[23] In order to support its "emergency" theory, the United States dances a fine line: It characterizes the statement as in response to questioning, Br. at 13-14 n.3 (because otherwise the theory could not apply) but not to interrogation (because otherwise it would fit within one of the core categories enumerated by *Crawford*, 541 U.S. at 51-52). Faced with the same dilemma, the State also equivocates, saying that "it may seem reasonable to assume that Officer Mooney at that point [when he spoke the second time with her] would have again asked Amy Hammon what happened," but that "the transcript does not support the notion that any extensive questioning took place," and that in fact "there is no evidence in the transcript" that he asked even one question at that point. Br. at 44-45.

is true. But notice that in the United States's view an important factor in making emergency questioning non-testimonial is that it does not make such communication, and the affidavit is deemed not to be in response to emergency questioning because it was accompanied by such communication. To the extent that the argument is not circular, it is therefore simply a variation of a formality theory. The United States also appears to argue that only after Mrs. Hammon made the oral accusation did the officers have enough information to know "how to resolve" the emergency. Br. at 15. But that "resolution" was to solicit the affidavit and then *arrest* Petitioner; clearly, that was the point of the preceding questioning. Further, the officers had ample reason beforehand to believe that Petitioner had committed a battery. *See, e.g.*, U.S. Br. at 12-13. What they did not have, what apparently they would not leave the house without (as Mrs. Hammon must have realized), was an explicit accusation, without which there would have been insufficient evidence to prove guilt beyond a reasonable doubt.

Petitioner does not mean to cast doubt on the good faith of Officer Mooney, or to suggest that he did not have concerns for the safety of Mrs. Hammon and others. Assuming *arguendo* that he did not act coercively, he did nothing wrong. But plainly the questioning that led to Mrs. Hammon's oral accusation was part of a process of gathering evidence, which culminated in accordance with the officer's usual practice in the solicitation and preparation of an affidavit.

V. Domestic Violence, Like Other Crimes, Must and Can be Prosecuted in Accordance with the Constitution.

Much of the effort on the State's side is directed at showing that accusations like Mrs. Hammon's are critical to the prosecution of domestic violence. The short answer, of course, is that domestic violence, like all crimes, must be prosecuted in accordance with the Constitution – and the Confrontation Clause

applies to "all criminal prosecutions," without an exception for domestic violence.

Until *Crawford* set the law on a proper course, this Court's decision in *White v. Illinois*, 502 U.S. 346 (1992), opened a clear channel for so-called "evidence-based prosecutions."[24] Recognizing the constitutional command in this context will no doubt have an impact on these prosecutions, but it will hardly leave prosecutors toothless. *See generally Amicus* Br. of American Civil Liberties Union, at 18-25; Tom Lininger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747 (2005).

First, with appropriate efforts, organization, and cooperation among government agents, it is possible to keep complainants safe, encourage and enable them to testify at trial, and secure convictions. Authority for this proposition may be found in a report, published by *amicus* NDAA, of a project of *amicus* Cook County, funded by *amicus* United States, through the Justice Department's Violence Against Women Project.[25]

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[24] This is a misleading term, because their defining characteristic is the critical evidence that is *not* presented, in-court testimony by the accuser subject to cross-examination.

[25] Richard Devine, *Targeting High Risk Domestic Violence Cases: the Cook County, Chicago, Experience*, 34 APR PROSECUTOR 30 (March/April 2000) (describing Target Abuse Call, which achieves goals of holding offenders accountable, with 90% conviction rate, and ensuring safety of victims, approximately 80% of whom participate in prosecution). *See also* Cook County State's Attorney's Office, *Domestic Violence: Target Abuser Call - T.A.C.*, <http:// www.statesattorney.org/dvtac.htm>; Center for Educational Media, *Snapshots of Success: Cook County, Illinois* (2001) (video).

Not all prosecutors are so conscientious. Cook County State's Attorney Richard Devine has referred to those who "serve the subpoena and walk away," Devine, *supra*, at 32. Not surprisingly, some prosecutors prefer to try a domestic violence case without the complainant testifying at trial, APRI, *DV 101*, <http://www.ndaa.org/apri/programs/vawa/dv_101.html>, ("Some jurisdictions are even finding that they are winning more cases without the victim's cooperation than they won with her cooperation."); the case is so much more unpredictable if one cannot be sure how the chief witness will testify on direct and cross-examination.

Second, under the doctrine of *California v. Green*, 399 U.S. 149 (1970), reaffirmed by *Crawford*, 541 U.S. at 59 n.9, the Confrontation Clause does not bar the complainant's prior statement if she testifies at trial, even if she does so inconsistently with that statement. Indiana tightly restricts the circumstances in which prior inconsistent statements are exempted from the rule against hearsay, *see* Ind. R. Evid. 801(d)(1)(A), but it is free to change that choice. *Compare* Cal. Evid. Code § 1235.

Third, if the complainant is able to confront the accused shortly after the incident, the State may offer a prompt deposition, or some other pre-trial proceeding providing an adequate opportunity for cross-examination. That testimony may be admitted at trial if she is unable to testify then. the earlier testimony could be admitted. *Crawford*, 541 U.S. at 54, 57.

Fourth, diligent prosecution can often secure a conviction without relying on a testimonial statement by the accused. As *amicus* NDAA has pointed out through its research arm, "Prosecutors win murder trials all the time without the testimony of the victim; the same is possible in assault and other domestic violence cases."[26] In this case, Mrs. Hammon's accusation was essential to the prosecution, but had the facts been slightly different – had she been bruised, which may have been expected given the State's contention that Petitioner had shoved her head into broken glass, *see* J.A. 18, 21, 29 – this may not have been so.

Fifth, if wrongful conduct of the accused causes the complainant to be unable to testify, then the accused should be held to have forfeited the confrontation right.[27] Contrary to a

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[26] APRI, *Preparing a Domestic Violence Case*, *supra*.

[27] Whatever the shape of forfeiture doctrine – a question not presented by this case – surely the prosecution has the burden of demonstrating on the facts of the particular case whether the accused forfeited the right. One does not automatically lose the confrontation right by being accused of domestic violence any more than by being accused of, say, organized crime. It is important in this connection to bear in mind that witness intimidation (not a factor in this case) is not limited to the domestic violence context. *See*

suggestion made by *amici* NNEDV et al., Br. at 22 n.16, Petitioner believes that a robust doctrine of forfeiture is an integral part of a sound conception of the right.[28]

Sixth, in some cases a state might impose sanctions if a complainant refuses to testify. The choice whether to do so is difficult, but if a state is unwilling to compel the complainant to testify, and if it cannot prove that the refusal to testify is attributable to wrongful conduct by the accused, the solution is not to disregard the accused's confrontation right.[29]

Seventh, because "one of the primary reasons why the criminal justice system has traditionally been ineffective in responding to domestic violence has been the relative inflexibility of treatment modalities," in some cases the most effective and appropriate response is diversion to alternative programs. EVE S. BUZAWA & CARL G. BUZAWA, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE 206 (2d ed. 1996); *see, e.g.*, Ind. Code 33-39-1-8 (authorizing diversion in appropriate cases).

In sum, states have available the tools to address the problem of domestic violence without need to rely on an unconstitutional option they never should have had.

CONCLUSION

The decision of the Indiana Supreme Court should be reversed.

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generally MICHAEL H. GRAHAM, WITNESS INTIMIDATION: THE LAW'S RESPONSE (1985).

[28] *See, e.g.*, Richard D. Friedman, *Confrontation and the Definition of Chutzpa*, 31 ISRAEL L. REV. 506 (1997); Pet. Br. at 21 n.21.

[29] Nor is the solution to rely on the accused's right to compel witnesses in his favor. Space limitations preclude offering the many responses that could be made to this bizarre suggestion, but it is difficult to resist the observation that, given the fact amply documented in the briefs supporting the state that domestic violence is often a crime of power and control, it is singularly inappropriate to depend on the possibility that the accused will compel the complainant, whose accusation has by hypothesis already been admitted, to appear in court for hostile examination.

Respectfully submitted,

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